

No. 49944-4-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

KAELA M. GLOVER,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did Glover not properly preserve whether the trial court erred when it imposed discretionary legal financial obligations or set up her monthly payments?
- B. Was the imposition of attorney fees permissible pursuant to RCW 10.01.160?
- C. Is the trial court's payment plan punitive?

II. STATEMENT OF THE CASE

The substantive facts which led to Glover's conviction are not particularly relevant to the matters she raises in this appeal. Glover was charged with Burglary in the Second Degree on August 24, 2016 for unlawfully entering or remaining in a Walmart in Chehalis, Washington, with the intent to commit a crime against person or property therein. CP 1. Glover, who had previously been trespassed from Walmart, entered the Chehalis Walmart on June 30, 2016 and stole candy and swimwear. CP 3-4. Glover elected to have her case tried to a jury and was convicted as charged. CP 15.

Glover was sentenced to 63 months in prison. RP 241; CP 40. The trial court ordered Glover to pay the following legal financial obligations:

\$ 500.00 Victim Assessment

\$ 200.00 Filing Fee

\$ 2,100.00 Court Appointed Attorney Fees

\$ 100.00 DNA Collection Fee

CP 42; RP 243. Glover timely appeals. CP 47.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. WHETHER THE COURT ERRED IN IMPOSING THE LEGAL FINANCIAL OBLIGATIONS WITHOUT A PROPER INQUIRY HAS NOT BEEN PRESERVED FOR REVIEW.

Glover makes three arguments in regards to her legal financial obligations (LFO), (1) that the trial court improperly calculated her attorney fees in such a way that it violated RCW 10.01.160(2) by tying the cost to her jury trial, (2) that the trial court improperly levied LFOs on her without doing an adequate inquiry regarding whether she had the present and future ability to pay those costs, and (3) the monthly payment amount towards her fines set by the trial court was unjustly punitive. Glover did not challenge the imposition of any of her legal financial obligations, or the monthly payment amount, at the time of her sentencing. See RP 239-46.

Glover argues she may challenge the alleged improperly calculated attorney fees for the first time on appeal because the trial court exceeded its statutory authority when levying the fees. Brief of Appellant 6; See *State v. Diaz-Farias*, 191 Wn. App. 512, 519-20 362

P.3d 322 (2015). While not conceding the attorney fees were improperly levied, the State will acknowledge the case law supports review and will address that issue in the section below.

Glover told the trial court there was no reason why she could not work once released from prison and she had worked previously. RP 242. Glover did not object when the trial court imposed the legal financial obligations, including the attorney fees and how they were calculated. RP 242-43. Glover did not object when the trial court found she had the future ability to make payments on her legal financial obligations. *Id.* Glover did not object when the trial court set her monthly payments at a rate of 25 dollars per month. RP 243. Glover's failure to object should preclude this Court from reviewing these issues on appeal.

Generally, the appellate court will not consider a matter raised for the first time on appeal. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An exception exists for claims of error that constitute manifest constitutional error. RAP 2.5(a)(3). If a cursory review of the alleged error suggests a constitutional issue, then Glover bears the burden to show the error was manifest. *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Error is "manifest" if Glover shows that she was actually prejudiced by it. If the court

reaches the merits of the claimed error it may still be harmless. *Kirkman*, 159 Wn.2d at 927.

In *Blazina* the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations there must be an individualized determination of a defendant's ability to pay. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Blazina, 182 Wn.2d at 837-38.

Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances and make an individualized determination about not only the present but future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. *Id.* The Supreme Court also suggested that trial courts look to GR 34 for guidance when evaluating whether a

defendant has the means available to pay discretionary legal financial obligations. *Id.* at 838.

Under GR 34 a person who receives assistance under a needs-based, means-tested assistance program is considered indigent for purposes of qualifying for court appointed counsel. GR 34(3). GR 34 also discusses the federal poverty level, living expenses, and other compelling circumstances as considerations for qualifying for court appointed counsel. *Id.*

Glover does not address her burden of proof under RAP 2.5 in regards to the remaining two issues, the alleged inadequate inquiry of her ability to pay her LFOs and the 25 dollar a month payment amount set by the trial court. Brief of Appellant 7-14. Glover never explains how she is able to raise issues she did not preserve in the trial court. These alleged errors were not preserved.

The trial court asked Glover, “with regard to legal financial obligations, Ms. Glover, when you’re not in custody, is there any physical or other reason why you can’t work and have a job, earn an income?” RP 242. Glover replied, “No.” *Id.* Glover, or her counsel, was more than able at this point to say, no, Glover cannot make these payments. RP 242-43. Glover or her counsel could have told the trial court Glover did not have sufficient assets, she had debts or

other financial burdens which made her unable to pay the legal financial obligations the State was requesting, but they did not. *Id.*

There was also no objection to the monthly payment amount imposed by the trial court. RP 243. This Court should exercise its discretion to not entertain Glover's unpreserved argument that the monthly payment amount as set by the trial court is unjustly punitive.

This Court should also exercise its discretion to not entertain Glover's unpreserved argument that the trial court did not make a proper inquiry regarding her ability to pay her legal financial obligations and affirm the trial court's imposition of the legal financial obligations. In the alternative, the trial court's inquiry of Glover satisfied the individualized inquiry required by the Legislature and *Blazina*, and this Court should affirm the costs imposed.

B. THE IMPOSITION OF ATTORNEY FEES WAS PERMISSIBLE PURSUANT TO RCW 10.01.160.

Glover argues the imposition of attorney fees, for recoupment of the cost of her indigent defense counsel, was impermissible because of the way the trial court calculated the amount due. Brief of Appellant 5-7. Glover asserts because the fee was calculated in part due to the length of her jury trial the fee violated RCW 10.01.160(2) and should therefore be stricken. The trial court did not

abuse its discretion when it imposed the \$2,100 in attorney fees, and this Court should affirm the judgment.

1. Standard Of Review.

The determination to impose legal financial obligations by a trial court is reviewed by this Court under an abuse of discretion standard. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015) (internal citation omitted). “A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

2. The Trial Court’s Calculation Of Attorney Fees Was Permissible And Not A Violation Of RCW 10.01.160(2).

Upon conviction, the court may impose costs on a defendant. RCW 10.01.160(1). The legislature has limited the costs the courts may impose to those that are “specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). The court may not “include expenses inherent in providing a constitutionally guaranteed jury trial.” *Id.*

The Legislature enacted 10.01.160 in 1976. Laws 1975-76, 2nd Ex. Sess., ch. 96, § 1. As enacted in 1976, the language stated,

Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

Id. at (2). While additional provisions have been added, the Legislature has not changed this language in 41 years. RCW 10.01.160(2).

RCW 10.01.160, as enacted in 1976, was identical to the Oregon statute upheld by the United States Supreme Court in *Fuller v. Oregon*.¹ *State v. Earls*, 51 Wn. App. 192, 194, 752 P.2d 402 (1988).² “The history of RCW 10.01.160 indicates the Legislature enacted it to satisfy state and federal constitutional requirements.” *Earls*, 51 Wn. App. at 195.

Immediately upon enactment the Attorney General’s Office was asked to provide an opinion in regards to the recoupment of certain enumerated costs for indigent defendants. 1976 Att’y Gen. Op. No. 14. The AGO opinion was asked to determine if the provision set forth in what is now RCW 10.01.160(1) could include:

(1) The cost of court appointed counsel for the defendant

¹ *Fuller v. Oregon*, 417 U.S. 40, 40 L. Ed. 2d 642, 94 S. Ct. 2116 (1974).

² Also citing 1971 Or. Laws, ch. 743, §§ 80-82, now codified as Or. Rev. Stat. §§ 161.665, 161.675, 161.185 (1971).

- (2) Witness fees paid under chapter 2.40 RCW for witnesses appearing for the prosecution;
- (3) Defendant's witness fees paid by the state;
- (4) Costs incurred by a county in paying the compensation of jurors under RCW 2.36.150;
- (5) Statutory filing fees required to have been paid to the clerk of the superior court in which the trial occurred.

Id. The AGO opinion concluded that court appointed counsel and witness fees could be recouped but juror compensation could not. *Id.* In regards to the filing fee, the AGO opinion concluded it fell outside the new law and within a different statute that was still enforceable to collect the filing fee upon conviction. *Id.*

In *Earls* the defendant argued that the imposition of fees for witnesses and the costs of investigators were not permissible because they are "expenses inherent in providing a constitutionally guaranteed trial" and therefore excluded from recoupment by the courts pursuant to RCW 10.01.160(2). *Earls*, 51 Wn. App. at 198.

The Court stated,

With regard to witness fees and the cost of investigators, the Oregon court has construed the identical provision in its statute, Or. Rev. Stat. § 161.665(2) (1971), to allow recoupment of these expenses as "costs specially incurred". *State v. Hastings*, 24 Or. App. 123, 544 P.2d 590 (1976); see AGO 14, at 5. We are persuaded this

interpretation is correct. This same reasoning applies to the sheriff's fee for service of process.

Id.

The *Earls* Court rejected Glover's argument. If witness fees and investigative fees are allowable as costs specifically incurred, so are attorney fees. The State does not deny that Lewis County pays its court appointed counsel per unit, and a day of trial is considered a unit, therefore the cost specifically incurred is greater when there are multiple days of trial. RP 243. Yet, if the Legislature wanted to change RCW 10.01.160 to exclude attorney fees from "costs specifically incurred" it has had 41 years to make such a change and had chosen not to do so. The trial court did not abuse its discretion when it imposed the \$2,100 in attorney fees upon Glover. This Court should affirm the trial court's ruling imposing the attorney fees.

C. ORDERING PAYMENT OF TWENTY-FIVE DOLLARS A MONTH IS NOT PUNITIVE.

Glover argues her monthly payment amount of 25 dollars a month is unjustly punitive because with an interest rate of 12 percent, Glover will never be able to pay off her debt. Brief of Appellant 11-14. The State maintains Glover waived this argument by failing to object in the trial court and she has not shown it is a manifest constitutional error subject to review for the first time on appeal.

Arguendo, Glover's argument fails because the minimum monthly payment amount is just that, and there are other remedies available regarding the interest rate.

The State will agree with Glover, that with an interest rate of 12 percent and payments of only 25 dollars a month the total financial obligations as ordered would be impossible to pay off due to the interest. That being said, a minimum monthly payment is just that, a minimum, generally set lower by the Courts to allow a person who first is released from prison to get resituated in their lives without imposing a high, unattainable monthly payment amount. A person can always pay more. This does not make it punitive.

The Supreme Court discussion about 25 dollars a month payments being punitive was in the context of legal financial obligations for indigent individuals. *City of Richland v. Wakefield*, 186 Wn. App. 596, 607, 380 P.3d 459 (2016). Yet, no one discussed motions to waive interest:

(2) The court may, on motion by the offender, following the offender's release from total confinement, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction as follows:

(a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations,

provided the offender shows that the interest creates a hardship for the offender or his or her immediate family;

(b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;

(c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, "good faith effort" means that the offender has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period, excluding any payments mandatorily deducted by the department of corrections;

(d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations only as an incentive for the offender to meet his or her legal financial obligations. The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090. The Legislature set up a system that rewards people who pay off the principle of financial obligations by waiving the interest. The legislative intent cannot and should not be ignored.

If a person convicted of a crime has the ability to pay discretionary legal financial obligations, those obligations are included in the incentivized system set up by the Legislature in RCW 10.82.090. This Court should hold that Glover's discretionary legal

financial obligations, the attorney fees levied against her, are not unjustly punitive due to the repayment schedule set up by the trial court.

IV. CONCLUSION

Glover raises two issues for the first time on appeal, whether the trial court improperly levied legal financial obligations without conducting the proper inquiry and her monthly payments are unjustly punitive. Glover fails to show these two issues are manifest constitutional error and therefore cannot raise them for the first time in this Court. The imposition of attorney's fees was not improper. Finally, the 25 dollar a month payment schedule was not unjustly punitive. This Court should affirm the attorney fees, the only discretionary legal financial obligation imposed on Glover by the trial court.

RESPECTFULLY submitted this 23rd day of October, 2017.

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